Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)))	WT Docket No. 17-79

COMMENTS OF THE STANDING ROCK SIOUX TRIBE

The Standing Rock Sioux Tribe ("Tribe") provides these comments on the Federal Communication Commission's ("FCC" or "Commission") Draft Report and Order released on March 1, 2018 ("Draft Order").

The Draft Order seeks in various ways to subordinate vital Tribal interests regarding sacred places and environmental protection to the desires of the broadband industry. To the Tribe, the protection of religious and cultural sites and our land and water resources is central to our belief systems and vital to our continuation as a people. The importance of these interests is expressly recognized by federal law—including through the National Historic Preservation Act ("NHPA"). And the FCC, along with every other federal agency, has a trust responsibility to consult in a meaningful way with Tribes, and to make informed decisions that protect Tribal interests. The question for the FCC is not how to help industry increase profits by circumventing or limiting Tribal consultation, but rather how can FCC work with Tribes to understand how best to protect Tribal religious and cultural sites in the context of broadband development that we all agree can serve useful functions. Unfortunately, the Draft Order makes it plain that the FCC's objective is to support the economic interests of the telecommunications industry, while narrowing the procedural and substantive rights of the Tribes regarding protection of culturally important sites. Standing Rock, as a result, opposes the adoption of the Draft Order, and urges FCC to undertake more meaningful consultation with Tribes on the topics it addresses.

I. Background.

The Tribe is a federally recognized Indian tribe, with approximately 16,000 members. The Standing Rock Reservation is a sparsely populated, rural Reservation that lies partly in South Dakota and partly in North Dakota, covering some 2.3 million acres. Our Reservation continues to suffer from chronic poverty and high unemployment, with a persistent unemployment rate significantly above 50%. Our rural location and lack of adequate infrastructure of all kinds—including roads, water and sanitation, and telecommunications—contribute to the economic challenges faced by the Tribe.

Standing Rock supports the need for advanced broadband – particularly for Indian country. That is why the Tribe took it upon itself to launch its own Tribal telecommunications network and company, Standing Rock Telecommunications, Inc. ("SRTI"). SRTI has purchased bandwidth and invested in the basic telecommunications infrastructure that was lacking on the Reservation, starting with 17 cellular towers. But broadband development must be done in a manner that fully protects vital tribal interests, including our historic and sacred sites.

II. The FCC's Position that Small Wireless Facilities Not Qualify as "Undertakings" or "Major Federal Actions" is Erroneous.

The FCC's consultation obligations under the NHPA are a component of the government-to-government relationship with Tribes which is based in the U.S. Constitution, treaties, statutes, and court decisions. Consultation is essential to the Federal Government's relationship with Tribes, as consultation provides the foundation for informed decision-making necessary to protect Tribal interests. Without meaningful consultation, the FCC has no way to know what the impact of a proposed activity will be on Tribal sacred sites and other cultural properties. As a general matter, the FCC recognizes this, including in the Draft Order. But the Draft Order nevertheless seeks in a variety of ways to limit and undermine the FCC's fundamental obligations.

For example, in the Draft Order, the FCC seeks to eliminate completely its consultation obligations with respect to an entire category – which it calls "small wireless activities." But the FCC lacks the authority to make such a blanket exception. The obligations under the National Historic Preservation Act and the trust responsibility exist without regard to the size of the activity. The law requires FCC to consult with Tribes under section 106 of the NHPA on any "undertaking" – and this includes any activity or project that requires a federal approval, license, permit or federal funds. 36 C.F.R. 900.16(g). It is simply arbitrary and unlawful for the FCC to deem all small wireless activities as beyond the reach of these requirements – particularly since there has been no showing by the FCC that doing so will protect Tribal historic properties or environmental interests.

The FCC seeks to justify its action with respect to small wireless facilities by claiming that its position is supported by the "public interest." But the public interest is furthered by the federal government upholding its solemn obligations to tribes, by fully enforcing federal statutes, and by ensuring that historic properties and environmental values are not subordinated to the profits of industry. The public interest cannot simply be deemed to be whatever allows the telecommunications industry to proceed without regard to Tribal rights and the federally protected cultural resources of Indian people. Under the Draft Order, Tribal historic properties may be harmed by small wireless activities without the slightest concern by the FCC – and without even hearing from affected Tribes at all. In our view, that will be a tragedy, as losing important cultural sites and historic properties is certainly not in the public interest.

III. The Draft Order Fails to Recognize the Unique Knowledge of Tribes Regarding Their Historic Properties.

In its discussion of fees, the Draft Order treats Tribes just like any other consultant. Essentially, the FCC's position is that with respect to reviews after an initial determination that historic properties are likely in the vicinity (Draft Order at 44), it is simply a matter of the

applicant's choice – whether to work with the Tribe, or to avoid the Tribe and rely instead on a private consultant. But this approach fails to recognize the important and unique cultural knowledge and expertise of Tribal Historic Preservation Officers and other Tribal members, with respect to tribal cultural and historic properties. It should be beyond question that Tribes are uniquely qualified to assess their own history and culture and the importance of particular sites with respect to that culture and history. But the Draft Order fails to recognize the importance of Tribal expertise on these matters – simply leaving to the industry applicant's discretion the determination of whether to retain tribal expertise to evaluate culturally significant sites. Outside "experts" chosen by industry are not a proper substitute for the traditional, cultural knowledge of the Tribes themselves.

More broadly, the Draft Order takes an inappropriate and narrow view of Tribal fees in connection with Tribal participation in the section 106 process. By holding that up-front fees are not allowed (except voluntarily) and that fees for tribal participation in the 106 process are only required to the extent the industry applicant wants to hire the Tribe as a "consultant," the Draft Order will leave many Tribes without the resources needed to respond and participate with respect to applications.

The Tribe believes that the harsh rule in the Draft Order is an unfortunate over-reaction to a few isolated incidents – and is not based on an appropriate approach to Tribes generally. Just as any other government, Tribes are justified in charging a reasonable fee to applicants seeking permission for a project. Only Tribes have the expertise to identify cultural properties significant to their religions. And Tribal resources to support such work is extremely limited. Charging reasonable fees for essential work of this kind should not be viewed as a regulatory impediment. The FCC's due regard for the sovereign authority of Tribes compels respect for reasonable fees

charged to cover the expenditure of scarce Tribal government resources to assist the FCC and applicants with their NHPA compliance.

In short, the FCC should not impose a rule that will, as a practical matter, impose additional burdens on tribal participation in the section 106 process.

IV. Meaningful Tribal Consultation is Required.

The issues raised by Standing Rock and other Tribes around the country reflect the deep concerns of Indian country with respect to the Draft Order. The stakes are high here – as once cultural properties are lost, that loss can be forever. But the process used by the FCC to arrive at this Draft Order has been inadequate. While there have been some meetings and conference calls, for the most part that has consisted of listening sessions – not the meaningful, government-to-government consultation that is required. The FCC must take this opportunity to consult with Tribes. As the Advisory Council on Historic Preservation ("ACHP") recently wrote to the FCC on this matter, the significant changes proposed by the FCC require "effective consultation," and as a result the ACHP would "strongly urge the FCC to further engage" with Tribes and other stakeholders "to seek agreeable solutions to their outstanding issues." Letter from John M. Fowler, Executive Director, ACHP, to Thomas M. Johnson, Jr., General Counsel, FCC (March 15, 2018).

We urge the FCC to adopt the ACHP's recommendation and to engage in meaningful consultation with Tribes to address the issues raised by the Draft Order.

Respectfully submitted,

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Chairman